SURFACE TRANSPORTATION BOARD

49 CFR Chapter X

[Docket No. EP 733]

Expediting Rate Cases

AGENCY: Surface Transportation Board.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: Pursuant to section 11 of the Surface Transportation Board Reauthorization Act of 2015, the Surface Transportation Board (Board or STB) is instituting a proceeding through this Advance Notice of Proposed Rulemaking (ANPR) to assess procedures that are available to parties in litigation before courts to expedite such litigation, and the potential application of any such procedures to rate cases before the Board. The Board also intends to assess additional ways to move stand-alone cost (SAC) rate cases in particular more expeditiously.

DATES: Comments are due by August 1, 2016. Reply comments are due by August 29, 2016.

ADDRESSES: Comments on this proposal may be submitted either via the Board's e-filing format or in the traditional paper format. Any person using e-filing should attach a document and otherwise comply with the instructions at the E-FILING link on the Board's website, at http://stb.dot.gov. Any person submitting a filing in the traditional paper format should send an original and 10 copies to: Surface Transportation Board, Attn: EP 733, 395 E Street, SW., Washington, DC 20423-0001. Copies of written comments will be available for viewing and self-copying at the Board's Public Docket Room, Room 131, and will be posted to the Board's website. Information or questions

regarding this ANPR should reference Docket No. EP 733 and be in writing addressed to: Chief, Section of Administration, Office of Proceedings, Surface Transportation Board, 395 E Street, S.W., Washington, DC 20423-0001.

FOR FURTHER INFORMATION CONTACT: Allison Davis: (202) 245-0378. [Assistance for the hearing impaired is available through the Federal Information Relay Service (FIRS) at 1-800-877-8339.]

SUPPLEMENTARY INFORMATION: Section 11 of the Surface Transportation Board Reauthorization Act of 2015, Public Law 114-110, 129 Stat. 2228 (2015) (STB Reauthorization Act) directs the Board, not later than 180 days after the date of the enactment of the Act, to "initiate a proceeding to assess procedures that are available to parties in litigation before courts to expedite such litigation and the potential application of any such procedures to rate cases." 129 Stat. 2228. In addition, section 11 requires the Board to comply with a new timeline in SAC cases.[1]

In advance of initiating this proceeding, Board staff held informal meetings with stakeholders[2] to explore and discuss ideas on: (1) How procedures to expedite court

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[1] The statute previously required the Board to issue a decision no later than 270 days after the close of the record, which the Board measured from the filing of closing briefs. Under the STB Reauthorization Act, the Board is now required to issue a decision no later than 180 days after the close of the record, which by statute is now defined to exclude closing briefs. See 49 U.S.C. 10704(d)(2). Thus, pursuant to the STB Reauthorization Act, the time available to the Board to issue a decision after closing briefs has been reduced from 270 days to 150 days. The Board has adopted a new timeline to comply with this provision. Revised Procedural Schedule in Stand-Alone Cost Cases, EP 732, slip op. at 2-5 & n.3 (STB served Mar. 9, 2016).

[2] Board staff met with individuals either associated with and/or speaking on behalf of the following organizations: American Chemistry Council; Archer Daniels Midland Company; CSX Transportation, Inc.; Economists Incorporated; Dr. Gerald Faulhaber; FTI Consulting, Inc.; GKG Law, P.C.; Growth Energy; Highroad Consulting; L.E. Peabody; LaRoe, Winn, Moerman & Donovan; consultant Michael A. Nelson;

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litigation could be applied to rate cases, and (2) additional ways to move SAC cases forward more expeditiously.

Based on the Board's experience in processing rate cases, as well as the feedback received during the informal meetings, the Board has generated a number of ideas to expedite rate cases. We now seek formal comment on procedures used to expedite court litigation that could be applied to rate cases and the ideas listed below to expedite SAC through this ANPR.[3] In their comments, parties may address any relevant matters, but we specifically seek comment on the following potential changes to SAC rate cases.

(. . . continued)
Norfolk Southern Railway Company; Olin Corporation; POET Ethanol Products; Sidley Austin LLP; Slover & Loftus LLP; Steptoe & Johnson LLP; The Chlorine Institute; The Fertilizer Institute; The National Industrial Transportation League; and Thompson Hine LLP. We note that some participants expressed individual views, not on behalf of the organization(s) with which they are associated.

[3] Since 2014, the Board has also undertaken a number of internal changes to process SAC cases more efficiently. Although these changes will not require any stakeholder action, the Board expects that they will lead to improvements in the way the Board manages case workflow. These changes include greater use of technical conferences with parties early in proceedings, issuance of evidentiary instructions following the technical conferences, internal management structure changes for rate cases, improving communication and coordination among Board staff, and setting additional milestone markers within our internal workflow.

Pre-Filing Requirement

In order to expedite SAC cases, several stakeholders suggested that the Board could require a complainant to file a notice before filing its complaint.[4] This would create a "pre-complaint" period, during which the railroad would have time to start preparing for litigation, including gathering documents and data necessary for the discovery stage, which in turn could benefit both parties by accelerating the discovery process.

If a pre-filing notice were adopted, the Board could also use this pre-complaint period to provide parties the opportunity to engage in early-stage mediation, and appoint a mediator upon receipt of the pre-filing notice.[5] This would not prevent parties from engaging in mediation at any other time during the proceeding, and the Board could encourage the parties to do so.

We therefore seek comment on the merits of adopting a pre-filing requirement in SAC cases, and, if a pre-filing notice were adopted, the information that should be contained in that notice and the appropriate time period for filing the notice (e.g., 30 or 60 days prior to the filing of a complaint). Parties may also comment on the idea of offering or requiring mediation during a pre-complaint period, or any other period during the rate case.

Discovery: Standardized Requests and/or Disclosures

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[4] In the context of major and significant mergers, the Board requires a pre-filing notification. See 49 CFR 1180.4(b).

[5] Currently, the Board's regulations state that, in a SAC case, a shipper must engage in mediation with the railroad upon filing a formal complaint and that a mediator will be assigned within 10 business days of the filing of the shipper's complaint. 49 CFR 1109.4(a) and (b).

In order to expedite litigation, some federal courts have focused on streamlining discovery by, among other things, requiring early disclosures. See, e.g., Fed. R. Civ. P. 26(a)(1). In the informal meetings, several stakeholders stated that standardizing discovery would help expedite rate cases and reduce the number of disputes between the parties. Several stakeholders explained that, over the years, the initial discovery requests relating to both the SAC and market dominance portions of SAC cases have become relatively consistent, and that formalizing such requests could be helpful. Accordingly, the Board could require the parties to either serve standard discovery requests or disclosures of information with the filing of their complaints and answers.

For example, on the filing of the complaint, the complainant could be required to either: (a) Serve a standard set of discovery requests on the defendant railroad covering data pertinent to creation of the stand-alone railroad (SARR), or (b) serve a standard set of disclosures pertinent to market dominance. Then, on the filing of the railroad's answer, the railroad could be required to either: (a) Serve a standard set of discovery requests on the complainant pertinent to market dominance, or (b) serve a standard set of disclosures pertinent to creating the SARR.

Based on the informal discussions with stakeholders, the standard initial information related to creation of the SARR might include: waybill data; train and carload data; timetables; track charts; authorizations for expenditure; grade, curve, and profile data; Wage Forms A & B; Geographic Information System data; forecasts; and contracts. Standard information related to market dominance might include: forecasts for issue traffic, alternative transportation options, and states in which the SARR might operate.

Alternatively, rather than requiring requests or disclosures of traffic data related to the SARR, some stakeholders suggested that the Board could collect data that could be used in rate cases. The data could be made available to complainants upon the filing of a complaint and a protective order being entered. We are concerned, however, about how to standardize the data and the burdens collection of the data could impose.

Another potential standardized disclosure that the Board could consider involves software that is not available to the general public. The Board could consider requiring the disclosure by each party of any such software it intends to use in its evidentiary submissions by, for example, the close of discovery. Such early disclosure may avoid disputes on appropriate software after the evidence has been presented.

We therefore seek comment on the advisability of adopting standardized discovery requests and/or disclosures or a database of standardized traffic data as discussed above, as well as the appropriate content and timing of such requests and/or disclosures. Because the Board generally does not have an opportunity to review uncontested discovery requests, it would be beneficial to the Board for parties to include in their comments copies of their initial discovery requests served in recent SAC cases, where applicable, to provide guidance on common discovery topics.

Discovery: Other Ideas

Some federal courts have also streamlined discovery in other ways, such as by adopting limits on discovery. If the Board requires mandatory initial discovery requests or disclosures, such that the core information necessary for a SAC case is accounted for, the Board could then limit the number of additional discovery requests allowed by each party. The Board could allow a party to obtain discovery beyond the set limit only upon

a showing of good cause, for example. We seek comment on the merits of limiting discovery requests in conjunction with adopting standardized initial requests/disclosures, and what, if any, those limits should be.

Stakeholders also indicated that the Board could either encourage or require more requests for admissions (particularly with respect to the issue of market dominance) to narrow the scope of contested issues and to avoid the unnecessary presentation of evidence. To encourage thorough and honest consideration of the requests, if a party denies a request for admission with no basis for doing so, that party would pay for the litigation of the issue. See 49 CFR 1114.27 (providing for requests for admission); 49 CFR 1114.31(c) (providing for "the reasonable expenses incurred in making that proof"). We seek comment on whether the use of requests for admissions might assist parties and expedite SAC cases.

In the informal meetings, stakeholders also indicated that some discovery disputes over scope and terminology occur with regularity, and that the Board could obviate those disputes through standardization. For example, when an interrogatory or request for production asks for information from a date certain "to the present," the Board could define that term by rule to avoid continued disputes from case to case. We therefore seek comment on how the Board might appropriately define "to the present," as well as comment on any other term or scope issue that could be standardized to avoid unnecessary discovery disputes.

Finally, to encourage parties to resolve discovery disputes among themselves, the Board could consider a rule similar to one used by federal courts requiring parties filing motions to compel to certify that they have attempted to confer with the opposing party.

See Fed. R. Civ. P. 37(a)(1) ("The motion [to compel disclosure or discovery] must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action."). The Board could also consider whether such a requirement should be used for other types of motions, such as modifications to the procedural schedule. See, e.g., 49 CFR 1111.10(a) (requiring parties in complaint proceedings to "meet, or discuss by telephone, discovery and procedural matters within 12 days after an answer to a complaint is filed."). We seek comment on the merits of such a requirement.

Evidentiary Submissions: Standardization

In the informal meetings, stakeholders indicated that standardization of certain evidence could not only reduce the number of litigated issues, thereby expediting the case, but would also allow parties before a rate case has even started to more accurately assess their respective positions and the potential outcome of the case. Stakeholders cautioned, however, that standardization has the potential to favor one side or the other; thus the Board should be cognizant of those implications when selecting methods of standardization.

Standardization could be done in a number of ways. For example, the Board could standardize unit costs based on actual railroad data or prior rate cases; standardize sources of data that parties can rely on; or standardize a methodology to be used for particular items.

There are various areas in a SAC case that may be well-suited to some form of standardization or simplification. For example, rather than deciding each individual element within the general and administrative (G&A) section, the Board could estimate

G&A as a percentage of the SARR's total revenue or based on the SARR's traffic levels, or the Board could adopt one party's entire G&A evidence over the other. For maintenance of way (MOW), the parties could develop MOW expenses by developing a general unit cost by dividing MOW operating costs by the Trailing Gross Ton Miles found in the R-1 multiplied by the General Overhead ratio found in the Board's Uniform Rail Costing System. Construction costs might be standardized by using R-1 data or the carriers' depreciation studies to develop the cost per track mile. Similarly, the Board could develop standardized locomotive acquisition costs using data from the R-1 reports (Schedule 710S) and the carriers' periodic depreciation studies. Finally, the Board could use Wage Forms A&B to standardize wages/salaries.

Although we invite comment on any item that commenters believe should be standardized, we seek comment on the specific areas listed above.

Evidentiary Submissions: Other Ideas

Stakeholders also discussed ways to address the exceedingly large number of contested issues in each case, and how that affects the presentation of evidence. The Board could consider early resolution of certain issues through interim rulings to narrow the scope of the case or to avoid the evidentiary misalignment that occurs when parties build their cases on top of fundamental disagreements, as well as encouraging motions practice as a means of managing the scope and timing of cases. For example, if the railroad believes a complainant's operating plan cannot be corrected, the Board could require the railroad to file a motion to dismiss rather than submitting a reply based on a different operating plan in order to avoid the problem of misaligned evidentiary submissions. In other words, the Board could determine that a railroad may not submit

an entirely new operating plan in its reply. Assignment of attorneys' fees or extension of rate prescriptions could be used to discourage frivolous motions to dismiss. Depending on the technical challenge presented by a case, the Board could dismiss a case without prejudice.

Another concern that impacts the Board's ability to process cases efficiently and the parties' ability to respond to each other's evidence relates to the scope of the pleadings. Many stakeholders expressed concern that the scope of rebuttal filings is often disproportionate to that of opening filings and that final briefs are often more akin to surrebuttal than a summary of key issues. To address these concerns, the Board could more strictly enforce the evidentiary standard set forth in Duke Energy Corp. v. Norfolk Southern Railway, 7 S.T.B. 89, 100 (2003), which requires that the complainant "must present its full case-in-chief in its opening evidence," in conjunction with consideration of motions to strike inappropriate rebuttal evidence. Additionally, the Board could consider putting a page limit on rebuttal evidence (e.g., cannot be longer than opening, or must be no more than half the length of opening). The Board could also limit final briefs to certain subjects on which the Board would like further argument rather than allowing generalized argument.

Next, to address concerns about parties' rate case presentations relying on software that is not available to the general public, some stakeholders suggested that the Board should restrict a party's ability to use such software in its rate presentation unless it provides a temporary license to the opposing party. If the Board required parties to provide temporary licenses to use non-publicly availably software, whenever parties used

such software in their rate case presentations, such provision could be made along with a disclosure of the software being used, as discussed earlier.

Finally, to give parties more time to ensure that public versions of filings are appropriately redacted without delaying the case, the Board could consider staggering the filing of public and highly confidential versions of the parties' pleadings. For example, parties could file their highly confidential pleadings and workpapers according to the procedural schedule, but have an additional period of days to file their public versions. We seek comment on these ideas, and others, relating to whether interim rulings, narrowing the scope of pleadings, software requirements, and staggering public and confidential versions would assist parties, minimize disputes, and expedite SAC cases.

Interaction with Board Staff

During the informal meetings, numerous stakeholders expressed that increased interaction with Board staff during all stages of a SAC case would be beneficial. To that end, during and/or after the submission of evidence, the Board could make more aggressive use of written questions from staff and/or technical conferences with the parties to clarify the record. If technical conferences are used, the Board could provide advance notice of the topics to be discussed to promote an efficient and productive conference. An early technical conference could be useful to establish ground rules and issue-specific Board expectations. The Board could also consider assigning a staff member as a liaison to the parties to facilitate greater interaction. This could allow the Board to be more available to the parties, particularly toward the beginning of a case, to answer questions about the process and to intervene informally (e.g., hold status conferences) if it would help discovery or other matters move more smoothly. Both

technical conferences and additional interaction with Board staff would be encouraged at any time during the proceeding.

Regulatory Flexibility Act

Because this ANPR does not impose or propose any requirements, and instead seeks comments and suggestions for the Board to consider in possibly developing a subsequent proposed rule, the requirements of the Regulatory Flexibility Act of 1980, 5 U.S.C. 601-612 (RFA) do not apply to this action. Nevertheless, as part of any comments submitted in response to this ANPR, parties may include comments or information that could help the Board assess the potential impact of a subsequent regulatory action on small entities pursuant to the RFA.

It is ordered:

1. Initial comments are due by August 1, 2016.
2. Replies are due by August 29, 2016.
3. This decision is effective on its date of service.

Decided: June 14, 2016.

By the Board, Chairman Elliott, Vice Chairman Miller, and Commissioner Begeman.

Raina S. Contee,

Clearance Clerk.

FR-4915-01-P

[FR Doc. 2016-14625 Filed: 6/20/2016 8:45 am; Publication Date: 6/21/2016]